IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-668

IRVING M. MOLEVER; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian for LYNN E. WEINBERGER, a Minor, JILL A. WEINBERGER, a Minor and AMY D. WEINBERGER, a Minor; DON D. BROOKS; MODERN MARTS INC., a Pennsylvania Corporation; JEAN B. PARIS; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Corporation,

Petitioners,

v.

ROBERT LEVENSON; DONALD LEVENSON; REICHART FURNITURE COMPANY, a West Virginia Corporation; THE BANK OF WHEELING, a West Virginia Corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents Robert Levenson, Donald Levenson, Reichart Furniture Company and The Bank of Wheeling hereby oppose the petition for a writ of certiorari filed by Irving M. Molever, *et al.*, to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTORY STATEMENT

Respondents do not accept either the "Statement of the Case" or the "Questions Presented" as framed by the petitioners.

As for the "Statement of the Case," respondents respectfully request the Court to refer to the opinion of the Fourth Circuit, reproduced in the appendix to the petition, for a fair and adequate statement of the facts.

As for the "Questions Presented," none of the points of decision below seems worthy of this Court's review on certiorari. Respondents believe, therefore, that no useful purpose can be served by attempting to restate the "Questions Presented" and, accordingly, will simply address themselves to the issues stated in the petition.

ARGUMENT

I. The Defamation Suit.

A. Question No. 1.

The gist of the petition, as to the defamation portion of the case, is that a judgment n.o.v. in favor of the respondents was affirmed on a ground alleged to be impermissible under this Court's decisions in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976)—that Molever was a "public figure."

The petitioners have misrepresented the Fourth Circuit's decision. That court did not affirm the judgment n.o.v. upon the "public figure" ground. It confined itself completely to the point of the common law privilege under West Virginia law. Petition App., p. 44a.

B. Question No. 2.

Petitioners urge this Court to resolve an alleged conflict among the circuits as to the propriety of the court, rather than the jury, determining "good faith" in "cases involving proof of *'New York Times'* malice." Petition, p. 19.

However, since the decision below was grounded solely upon common law privilege and did not even touch upon "*'New York Times'* malice", the alleged conflict among the circuits should await some more appropriate occasion for resolution.

II. The Stockholders' Derivative Suit.

A. Questions Nos. 1 and 2.

The Fourth Circuit ordered judgment for the respondents on the "floor plan" aspect of the stockholders' derivative suit upon the ground that their liability, if any, had been fully discharged by a valid release. Petitioners urge this Court to review that ruling upon the ground that the release violated a West Virginia statute as well as state policy enunciated by the Supreme Court of West Virginia.

The statute, W.Va. Code § 31-1-69 (1972) (repealed, effective July 1, 1975) provided that a director should not "vote on a question in which he is interested otherwise than as a stockholder . . . or be present at the Board while the same is being considered . . . ." The Fourth Circuit recited in its opinion (Petition, App., p. 38a) the "incontrovertible evidence" of respondents' full compliance with the statute:

> "The two Levensons withdrew from the meeting during the discussions of the proposal, returning

> thereafter—albeit before the voting—but did not vote."

The petition, at p. 22, without citing any evidence, asserts that there is "undisputed evidence in the record that . . . the Levensons *were present* at the time of the discussion . . . ." The only evidence in the record, which respondents did cite to the Fourth Circuit at p. 23, n. 24 of their brief in that court,[1] was the minutes of the meeting. That evidence fully supports the court's statement.

Equally spurious is petitioners' assertion that the Fourth Circuit condoned a violation of West Virginia policy. The policy petitioners refer to is that enunciated in *Chaunis* v. *Laing,* 125 W.Va. 275, 291-92, 23 S.E.2d 628, 636-37 (1942), that board action consenting to a misappropriation of corporate assets to majority stockholders, without consideration to the corporation, is not binding upon non-consenting minority shareholders. That policy has no application to the instant case. Here, as the Fourth Circuit declared, respondents were neither majority stockholders nor officers, there was no misappropriation of any corporate property and there was ample consideration to the bank. Petition, App., pp. 36a-38a.

B. The Judgment In Favor Of The Respondents Is Correct For A Reason Urged But Not Reached Below.

Having held that the release was a full and sufficient ground to preclude any recovery by petitioners on the "floor plan" portion of the stockholders' derivative

[1] The cited page is reproduced in the Appendix hereof as Exhibit A.

suit, the Fourth Circuit found it unnecessary to reach respondents' argument that petitioners lacked standing to maintain the suit. Petition, App., p. 39a.

To have maintained the suit, petitioners would have had to satisfy the requirement of Rule 23.1, Fed. R. Civ. P. that they "fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation . . . ." Respondents had filed a pretrial motion to dismiss the derivative suit upon the ground that petitioners did not adequately represent the class. The gist of their motion was that the nominal plaintiffs were mere puppets of Molever and that he was clearly disqualified to represent the bank's shareholders in the derivative suit since, as to the major part of the suit (the Dennis loans), the bank was litigating against Molever in a state court a claim that he, rather than the Levensons, was responsible for the bank's losses. The motion was overruled without prejudice to renewal at the trial and, when renewed at trial, was arbitrarily denied without consideration. Moreover, despite the rule that adequacy of representation of a class is not for the jury to determine, but "for the trial court to pass on judicially" (3B Moore, *Federal Practice,* § 23.07(1); *Flaherty* v. *McDonald,* 178 F. Supp. 544, 551 (S.D. Calif. 1959)), the court let the jury determine that the plaintiffs did adequately represent the class. See the respondents' brief below, p. 22.[2]

Had the Fourth Circuit reached the question thus raised by respondents, it is difficult to see how it could have avoided holding that the trial court should have dismissed the stockholders' derivative suit.

[2] Reproduced in the Appendix hereof as Exhibit B.

III. The "10b-5" Suit.

A. Question No. 1.

The first issue respondents urge for review on the "10b-5" portion of the litigation is whether a pledgor of stock in Molever's circumstances has standing to sue for damages under SEC Rule 10b-5.

We respectfully submit that this purported issue is not presented in this case. The Fourth Circuit, far from denying Molever standing to sue, assumed that he had it. It held against him because he had not made out a case on the merits. The court said (Petition, App., p. 34a):

> "No breach of the Act by this appellant is perceived. There was no 'device, scheme or artifice to defraud . . . in connection with the purchase or sale of [the stock].' Although not demandable, Molever had been given due notice of the intended sale. Moreover, he had been sent a financial statement of the Bank showing the addition to the Bank's assets. In law on these facts he had no ground of complaint."

B. Question No. 2.

Petitioners urge here that the Fourth Circuit's disposition of the 10b-5 case as a matter of law somehow conflicts with this Court's recent decision in *TSC Industries, Inc.* v. *Northway, Inc.*, — U.S. —, 96 S.Ct. 2126, 2133 (1976).

Molever's theory on his 10b-5 claim was that, at the time he made his choice not to redeem his pledged stock, there had been withheld from him certain information material to that decision. He had received a financial statement accurately reflecting the bank's assets. It had been his understanding, he says, that, over and

above those stated assets, the bank owned a contingent asset in the form of a claim on a fidelity bond. He had not been told that the claim had already been collected and the amount realized included in the bank's asset figure. Knowledge that there was no longer a contingent claim that might improve the bank's asset position *could not possibly* have induced Molever to attempt to redeem the pledged shares, for he considered them not worth redeeming even when he thought the bank's stated assets were contingently improvable. This Court, to be sure, did say in *TSC Industries* that materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact *would* have caused the reasonable investor to change his vote." Nothing in the opinion suggests, however, that an omitted fact which *demonstrably could not* affect the stockholder's decision is nevertheless material.

IV. The "Overall Question".

In respect of the Dennis loans aspect of the stockholders' derivative suit, the Fourth Circuit reversed the judgment entered in favor of petitioners upon the grounds (1) that there had been an impermissible consolidation of actions and (2) that the trial court had improperly curtailed the trial time in a manner "seriously injurious to the defendants." Petition, App., pp. 40a-42a. That portion of the case was remanded for a new trial. As to all other causes of action in the entire litigation, the Fourth Circuit, on holdings on dispositive legal issues, directed entry of judgment for the respondents.

Petitioners now argue at Petition, p. 29, that, having held the curtailment of trial time invalid, the Fourth Circuit was bound to recognize that the error cut both

ways and should, therefore, have remanded for a new trial of all the causes of action in the case. That course, petitioners argue, was dictated by this Court's decisions on Rule 50, Fed. R. Civ. P.

The Court's concern in the Rule 50 cases was "to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case." *Neely* v. *Eby Construction Co.*, 386 U.S. 317 at 325, *rehearing denied*, 386 U.S. 1027 (1967). The Court was also mindful, however, that:

> "There are, on the other hand, situations where the defendant's grounds for setting aside the jury's verdict raise . . . dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation." *Id.* at 327.

As an example of the latter type of situation, markedly appropriate here, the Court cited an appellate determination that an alleged defamation was privileged. *Ibid.*

The Court was, moreover, sensible of the propriety of entering judgment for the verdict-loser where the verdict-winner has shown the appellate court no grounds for a new trial in the event of reversal. *Id.* at 329. Here, to be sure, petitioners, in the very last phrase of their petition for rehearing below, requested, as an alternative to reinstatement of all the verdicts, that the case be remanded for a new trial. They did not, however, either in that petition for rehearing or in their appellate brief, complain of the trial curtailment

as erroneous or show how, if at all, it prejudiced them sufficiently to require a new trial of the various facets of the case which the Fourth Circuit decided on dispositive legal issues. Indeed, in their petition for rehearing, at p. 10,[3] they denounced the Fourth Circuit for its ruling on the trial curtailment issue as having "exceeded and abused the proper scope of appellate review by engaging in faulty logic." In their appellate brief, at p. 13,[4] rather than complaining of the trial curtailment, they said:

> "Unquestionably, Judge Maxwell's impartial time management plan was necessary to properly develop the facts of this case and insure that the jury would not be left in confusion. The trial court did not abuse its discretion by taking this action."

The Fourth Circuit, pointing out that what petitioners have euphemistically called the "time management plan" left the defendants about one day, out of the fifteen days of trial, to put on their case, held the ruling "seriously injurious to the defendants." Petition, App., pp. 41a-42a. The petitioners, having had all the rest of the time to put on their case, can hardly be heard to complain that they were prejudiced by the ruling. Indeed, in their appellate brief below, at p. 8,[5] they maintained that the ruling "did not prejudicially affect any party." To that assertion, they should be bound.

The court below having concluded on dispositive legal issues all facets of the litigation other than the Dennis

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[3] Reproduced in the Appendix hereof as Exhibit C.

[4] Reproduced in the Appendix hereof as Exhibit D.

[5] Reproduced in the Appendix hereof as Exhibit E.

loans portion of the stockholders derivative suit [6] and there being nothing in the record to suggest that a new trial could in any way affect those dispositive legal issues, there is no conflict with the philosophy of this Court's Rule 50 decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] Moreover, as shown *supra* pp. 4-5, there is a dispositive legal issue, not reached by the Fourth Circuit, upon which the Dennis loan portion of the case as well should have been concluded. Upon the return of the mandate to the district court, that dispositive ground will there be reasserted and hopefully will result in a dismissal of the case.

EXHIBITS

EXHIBIT A

Extract From Respondents' Brief in the Fourth Circuit Court of Appeals

B. The Release of Liability on the Floor Plan

The indemnification-release agreement, which was approved by the Bank's Board of Directors on February 23, 1967[24] (Ex. Vol. 289), and executed on May 10, 1967 (Ex. Vol. 344), released any claims the Bank might have against the Levensons or Reichart in connection with the floor plan.

There was no evidence that the release was obtained by fraud or duress. (JA X-4083-4132). On the very face of it, the agreement appeared to be in the Bank's best interests, for it established an absolute indemnification against any loss. Indeed, before executing the agreement, the Bank secured an opinion from independent counsel that the agreement was in its best interests. (Ex. Vol. 341.)

Nevertheless, the court sent the issue of the validity of the release to the jury, denying defendants' timely motions for summary judgment and directed verdict and thereafter also denying the motion for judgment n.o.v. The denial of defendants' various motions was clearly erroneous, for as this Court said in *Chesapeake & Ohio Ry. Co.* v. *Chaffin*, 184 F.2d 948, 952 (4th Cir. 1950):

> "Under the law of West Virginia, the evidence to overcome the clear and explicit terms of an express release must be strong and convincing. *Carroll* v. *Fetty*, 121 W.Va. 215, 219, 2 S.E.2d 521; *McCary* v. *Monongahela Valley Traction Co.*, 97 W.Va. 306, 125 S.E. 92. In the pending case the evidence of fraud or

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[24] In compliance with W.Va. Code § 31-1-69 (1972), the Levensons, although members of the Board, absented themselves from the discussion which resulted in the resolution approving the agreement and abstained from voting on it. (Ex. Vol. 289.)

misrepresentation or mistake is non-existent; and the judgment must be reversed and the case remanded with instructions to enter a judgment for the defendant." [25]

Plaintiffs' sole argument below in derogation of the release was the false assertion that the Levensons owned the majority of the Bank's stock and thus could have dictated the Board's action. (JA X-4201-02.) As plaintiffs' counsel well knew, the figures from the stock ledger, while showing the Levenson family as owners of over 50 percent

[25] See also *Janney* v. *Virginia Ry. Co.*, 193 S.E. 187 (W.Va. 1937); *Davis* v. *Lilly*, 122 S.E. 444, 448-49 (W.Va. 1924).

EXHIBIT B

Extract From Respondents' Brief in the Fourth Circuit Court of Appeals

A. The Trial Court Abdicated Its Function To Decide the Issue of Adequacy of Representation

Rule 23.1, Fed. R. Civ. P., provides:

> "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

Pursuant to that provision, the defendants, on March 2, 1971, moved to dismiss the derivative action on the ground that the plaintiffs did not adequately represent the class. The gist of their motion was that the nominal plaintiffs in the suit were mere puppets of Molever's and that he was clearly disqualified to represent the Bank's shareholders in the derivative suit since, as to the major part of that suit, the Dennis loans, there was at least an issue as to whether he, rather than the defendants, was responsible for the Bank's losses.[23] In its order of November 21, 1973, the trial court overruled this motion without prejudice to renewal at trial. At the opening of the trial, defendants' counsel inquired of the court whether it was the proper time to renew motions and the court replied that it would adhere to its decision overruling all motions. (JA II-24-25.)

To compound its totally unconsidered and arbitrary denial of defendants' motion, the court then completed its abdication of its judicial function by *sending to the jury* the

[23] The motion pointed out that at the time the derivative suit was brought there was pending, in a suit in the Circuit Court for Ohio County, West Virginia, a counter-claim by the Bank against Molever for substantial damages on the Dennis loan losses.

defendants' contention that the plaintiffs do not "fairly and adequately represent the interest of the shareholders of the Bank." (JA I-A389.) Although adequacy of representation "depends on the facts of the particular case," the determination of those facts is not for the jury, but "for the trial court to pass on judicially." 3B Moore, *Federal Practice*, §23.07(1); *Flaherty* v. *McDonald*, 178 F. Supp. 544, 551 (S.D. Calif. 1959).

EXHIBIT C

Extract From Petitioners' Petition for Rehearing in the Fourth Circuit Court of Appeals

C.

The Court Exceeded the Bounds of Appellate Review in Remanding the Dennis Losses Case for New Trial Based on the Trial Judge's Management of Trial Time

By its ruling remanding the Dennis Losses portion of this case for a retrial, this Court has exceeded and abused the proper scope of appellate review by engaging in faulty logic.

This Court correctly holds that the management of time in a trial is discretionary, but in the same judicial breath, and faced with a record of nearly five thousand pages pointedly demonstrating the clearest example of time-wasting, foot-dragging, repetitive and unnecessary cross-examination, this Court holds that the District Judge abused his discretion. The rule this Court adopts is wise —the application to the facts of this case is wrong, due to the cleverly parlayed "mousetrap" set by defense counsel at trial and sprung on this Court.

This Court's reliance on annotation, 5 ALR 3d 169 et seq. is misplaced. This annotation and its source cases are inapposite to Judge Maxwell's actions since the respective trial judges in those cases set an arbitrary limitation on the number of witnesses before hearing any witnesses or any evidence on any issue.

In the instant case six days of trial had elapsed before any mention was made of time restraints. The defendants were advised by the trial court daily of the remaining time. (T. 464, 819, 1934, 3836) If there was objection to the plan, defendants were bound to raise those objections timely. 88 CJS, Trial § 54 p. 154. In fact, defendants thought the plan even-handed. (T. 3503, 4234). The only

EXHIBIT D

Extract From Petitioners' Brief in the Fourth Circuit Court of Appeals

8, No. 74-1034, 74-1035, (4th Cir., Feb. 24, 1975); *United States* v. *Ostendorff*, 371 F.2d 729, 732 (4th Cir., 1967), *cert. den.* 386 U.S. 982 (1967).

The "trial court may act to clarify testimony and restrict questioning that the Court feels will be unproductive and confusing." *United States* v. *Atkinson*, at 8 & 9; *Simon* v. *United States*, 123 F.2d 80, 83 (4th Cir., 1941), *cert. den.*, 314 U.S. 694 (1941). In fact, the highest duty of a Federal trial judge is to "see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury." *United States* v. *Atkinson*, at 9; *Simon, supra*, at 83.

Most jurisdictions have recognized that a trial judge must control the trial in order to provide a fair and expeditious resolution of the issues while upholding the dignity and authority of the Court. *See e.g., Rickett* v. *Hayes*, 511 S.W.2d 187 (Ark. 1974); *Charles L. Hazelton & Sons, Inc.* v. *Teel*, 211 N.E.2d 352 (Mass. 1965); *Kroll* v. *Smith*, 139 N.E.2d 573 (Ind. 1957); *L. & S. Bearing Co.* v. *Morton Bearing Co.*, 93 N.W.2d 899 (Mich. 1959); *Martin* v. *Marshall*, 266 N.Y.S.2d 992 (1966). *See also*, Bowers, *The Judicial Discretion of Trial Courts*, § 249 (1931); Rule 403, F. Rules Evid.

Judge Maxwell's comments, during and after trial, clearly demonstrate the soundness of his position and the dilemma thrust upon him by defense counsel's conduct. (T. 3491-3506, 3584-88, 4231-35; A. 451-55). Unquestionably, Judge Maxwell's impartial time management plan was necessary to properly develop the facts of this case and insure that the jury would not be left in confusion. The trial court did not abuse its discretion by taking this action.

EXHIBIT E

Extract From Petitioners' Brief in the Fourth Circuit Court of Appeals

defendant the strategy of branding plaintiff a syphilitic. Further, as the Court noted, the testimony concerning syphilis was fairly abandoned and not fairly a part of the evidence. 279 U.S. at 315-16.

In the instant case, each and every statement made by plaintiffs' counsel was based on the record. That is why trial counsel did not object at the trial to what is now complained of.

Were the matters complained of in plaintiffs' summation as prejudicial as counsel for defendants now suggest, they would have been brought to the trial judge's attention during the trial either by an objection, request for curative instruction, or a motion for a mistrial. None of these measures were availed of or even suggested by defense counsel at the trial. This omission exposes defendants' contention of improper summation by plaintiffs counsel for what it is, a groundless last ditch effort to salvage a defeat.

2. Judge Maxwell's Time Management Plan Was Necessary To Prevent Abuse of the Court and Confusion of the Jury.

Defendants have misconstrued and misstated the intent, purpose and effect of the Court's decision regarding the management of trial time. Defendants charge that the judge wrongly confined the parties to an arbitrarily fixed time limit and forced them to the election between cross and direct. (D. Br. 44-45) Defendants freely chose the tactic of lengthy and repetitive cross examination. The time schedules suggested by the Court, were with sufficient notice to allow all parties to completely develop their cases and did not prejudicially affect any party. In the pretrial order, defense counsel estimated a two-week trial, while plaintiff's counsel estimated one week. (A-330).